Supreme Court U.S.
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No. 96-1114

In The

Supreme Court of the United States

October Term, 1996

In the Matter of DON R. DIXON and DANA DENE DIXON,

Debtor.

DALE WOOTTON, TRUSTEE,

Petitioner,

vs.

WOODY F. LEMONS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner states the question presented as follows:

> Whether or not the court should adopt the "functional" approach to defining executory contracts in bankruptcy cases, as opposed to the "countryman" approach, which appears to have been previously adopted by the court.

Petitioner misstates the issue. The question actually presented is as follows:

> Was Woody Lemons the owner of 27½% of 570 shares of Sterling Motors Ltd. stock embodied in a certificate held by Don Dixon's Bankruptcy Trustee, or was the stock "property of the bankruptcy estate"

LIST OF INTERESTED PARTIES

1. Dale Wootton, Respondent, Bankruptcy Trustee for Don R. Dixon, Chapter 7 Debtor, *pro se*

2. Woody F. Lemons, Plaintiff and Respondent

3. John D. Copeland, Counsel for Woody F. Lemons

4. Bradson Partners, Ltd., Assignee of Woody F. Lemons

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Cases Cited:

Cohen v. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.), 138 B.R. 687 (Bankr. S.D.N.Y. 1992) 9, 10, 11

In the Matter of Don R. Dixon and Dana Dene Dixon, Debtors, Dale Wootton, Appellant v. Young Family Trust, Appellee, No. 92-1754, March 25, 1993 .... 5, 9, 11

Rule Cited:

Supreme Court Rule 10(a) 12

Other Authorities Cited:

Bankruptcy Code § 365 ..... 4, 6

Michael T. Andrew, *Executory Contracts in Bankruptcy: Understanding "Rejection"*, 59 U. Colo. L. Rev. 845 (1988) 6, 7

Michael T. Andrew, *Executory Contracts Revisited: A Reply to Professor Westbrook*, 62 U. Colo. L. Rev. 1 (1991) 7

Jay L. Westbrook, *A Functional Analysis of Executory Contracts*, 74 Minn. L. Rev. 227 (1989) 7

Statement of the Case

A.

Opinions Below

Appendices A, B, and C[1] to the Petition[2] are substantially correct and verbatim transcriptions of the three Lower Court Decisions.

B.

Jurisdictional Statement

Respondent has no objection to Petitioner's jurisdictional statement.

C.

Applicable Federal Question

Petitioner has misstated the issue. Respondent states the issue as follows:

> Was Woody Lemons the owner of 27½% of 570 shares of Sterling Motors Ltd. stock embodied in a

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[1] All references to "appendix" refer to the appendices contained in the Petition.

[2] "Petition" refers to the Petition for Writ of Certiorari.

certificate held by Don Dixon's Bankruptcy Trustee, or was the stock "property of the bankruptcy estate?"

D.

Statement [of the Case] - Correction of Misstatements in the Petition

Petitioner's Statement [of the Case] is largely argument. It contains numerous factual statements that are not supported by the record or are contrary to the record. The record speaks for itself. Respondent will not burden the Court with a recitation of all Petitioner's misstatements, just a few.

Petitioner volunteers the comment, "This case arose out of the Bankruptcy case of Don Dixon, one of the principal figures in the savings and loan scandal of the 1980s." Petition at 4. The case did arise out of Don Dixon's bankruptcy, but there is nothing in the record that shows that Dixon was a principal figure in the savings and loan scandal of the 1980s. This irrelevant statement is obviously an attempt to prejudice this Court against Lemons.

Petitioner states that there is an undisputed agreement that

Lemons' interest would revert back to Dixon once Lemons was relieved of liabilities associated with the stock. Petition at 15. He argues that this is significant evidence that the arrangement in this case was an executory contract even under the "Countryman Approach" as well as under the "Functional Approach." There is not undisputed evidence that there was an agreement that the stock would revert back to Dixon once Lemons was relieved of liabilities. There was testimony to the effect that after Lemons had guaranteed $9 million in loans used to purchase the stock, and after he had become the owner of 27½% of the stock, he became convinced that owning the stock was more of a burden than a benefit. The liabilities associated with it were greater than the value of the stock. He made an offer, well after he became the owner of the stock, that if Dixon could "get him off of the notes" he would give his stock to Dixon. Dixon was never able to get Lemons off the notes, and the stock remained Lemons' property at the time Dixon filed bankruptcy. Lemons was subsequently sued as guarantor and maker of the notes used to purchase the stock. A significant judgment was taken against him. Lemons was right, the liabilities associated with the stock were

greater than the stock was worth. Lemons' victory in this case recouped him about one-fourth of his loss.

Reasons for Denying the Writ

A.

Summary of Argument

There is no compelling reason to grant the Petition. There is no conflict among the circuits, there is not a conflict on an important Federal question with a State Court of last resort, and there has been no such departure from the accepted and usual course of Judicial proceedings as to call for the Supreme Court to exercise its power of supervision. At most, Petitioner is making a case that the three lower courts that decided this issue made erroneous factual findings or applied a generally accepted rule of law (a Bankruptcy Trustee's power to reject executory contracts under Bankruptcy Code §365) incorrectly.

B.

If the Court Adopted Petitioner's Theory, It would Not Change the Result - The Decisions Below are Correct

At the time he filed bankruptcy, Dixon held a certificate for 650 shares (65%) of the stock of Sterling Motors Ltd. Peter Young, the Manager of Sterling Motors filed suit contending that he owned 80 shares of the 650 shares represented by the Certificate that was in the Trustee's hands. The Trustee countered with the argument that Young did not own the stock, but merely had an executory contract to acquire stock in the future. In the Young case the courts held that of these 650 shares, Young actually owned 80 shares, although they were embodied in the certificate for 650 shares held by the Bankruptcy Trustee. The courts rejected the Trustee's argument that Young had only an executory contract to receive stock in the future. In the Matter of Don R. Dixon and Dana Dene Dixon, Debtors. Dale Wootton, Appellant vs. Young Family Trust, Appellee, No. 92-1754, March 25, 1993. The Petitioner makes the same arguments in this case. He contends that Lemons did not own the stock but merely had an executory contract to acquire the stock in the future. All of the

lower courts rejected the executory contract theory and decided the case on a "property of the estate" theory. They held that the 27½% of the stock that Lemons claimed to own was actually his property, and it was not property of the estate.

Petitioner's Statement [of the Case] says:

> The critical issue is the determination of the nature of an oral agreement between the debtor and a business associate, and whether or not it is an executory contract, and if so, whether the Trustee can use the "functional approach" on the executory contract. Petition at 3.

Is Petitioner saying that the Functional Approach is a way of deciding whether a contract is executory or not? Or is the Petitioner saying that, if it is first determined that a contract is executory, the Functional Approach is a way for a bankruptcy trustee to determine whether to reject or accept it?

The Functional Approach appears to be Petitioner's synthesis of ideas that were discussed by two law professors in their volleying law review articles discussing problems with executory contracts under Section 365 of the Bankruptcy Code: Michael T. Andrew,

Executory Contracts in Bankruptcy: Understanding "Rejection", 59 U. Colo. L. Rev. 845 (1988); Jay L. Westbrook, A Functional Analysis of Executory Contracts, 74 Minn. L. Rev. 227 (1989); Michael T. Andrew, Executory Contracts Revisited: A Reply to Professor Westbrook, 62 U. Colo. L. Rev. 1 (1991). Petitioner tells the Court it should grant a writ because "it is now time for the courts to uniformly adopt the functional approach to analysis of executory contracts, as opposed to the formerly used Countryman definition approach." Petition for Writ of Cert. Page 11. Petitioner never states what the Functional Approach is, what it is used for, or how it would change the result from that reached under the Countryman Approach.

There is a telling admission in Petitioner's brief. His case is self-defeating. He states:

> The final reality of this case may be that it really does fit the "Countryman" definition of an executory contract, but the rationale and the logic of the "functional" approach gives even more credibility to the Trustee's position that this contract should be rejected. Petition at 17.

The Petitioner is admitting that it doesn't matter which approach is

used, the result should be the same.

If there was any executory contract in this case, it was not the arrangement whereby Lemons acquired ownership of the stock. If there was any executory contract, it was Lemons' proposal for Dixon to get him off the notes in exchange for the stock. By the time Dixon filed bankruptcy, both Dixon and Lemons were being sued for a deficiency judgment on the notes. Dixon's bankruptcy halted the deficiency suit against him. Lemons, who has never filed bankruptcy, had a deficiency judgment taken against him for approximately $1.25 million. He would have gladly given up the $300,000 recovery in this case for his stock, if the Petitioner could have relieved him of the $1.25 million deficiency judgment. If there was a binding agreement for Dixon to get Lemons off the notes, that was a second, separate, and subsequent agreement from the arrangement whereby Lemons became the owner of the stock. The second agreement may very well have been executory. If so, the Trustee has rejected it or breached it, and Lemons could have sued him for damages. The breach of that agreement would have been payable as a claim out of the bankruptcy estate in bankruptcy dollars,

and Lemons chose not to bother with it.

C.

There is No Conflict Among the Circuits

There is no conflict among the circuits regarding adoption of the Functional Approach and the Countryman Approach. Specifically, Petitioner asserts that there is a conflict between the Second Circuit in Cohen vs. Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.),138 B.R. 687 (Bankr. S.D.N.Y. 1992) and the Fifth Circuit in an unpublished *per curium* opinion involving this same bankruptcy estate, where the same Petitioner lost the same issue, involving a different stockholder. In the Matter of Don R. Dixon and Dana Dene Dixon, Debtors, Dale Wootton, Appellant vs. Young Family Trust, Appellee, No. 92-1754, March 25, 1993. There is no conflict between the Cohen case and the Young case. The Cohen case reconciles nicely with the Young case. The Cohen case does not support the Petitioner's position. It supports Lemons' position. The portion of Cohen analogous to Young deals with four separate portfolios of bonds held in an escrow account. Cohen and Drexel entered into an Employment Agreement

and an Escrow Agreement (the "Agreements"). Cohen was employed as general counsel for Drexel. The terms of the Agreements provided that upon commencement of the employment Cohen was to purchase four separate valuable portfolios of bonds from Drexel for the nominal consideration of $100 each. The bonds were placed in an escrow account. The portfolios remained in escrow and were to be released, one portfolio per year, to Cohen subject only to the condition that Cohen remain employed by Drexel. One portfolio would "vest" each year. In the event Cohen was terminated for cause, any portfolios remaining in escrow were to be redelivered to Drexel. By the time Drexel filed bankruptcy, all four portfolios had "vested" although the actual bonds were still in the hands of the escrow agent. The Court found that under New York law title passed to Cohen. Id. at 710. The Court then held that because title to the bonds passed to Cohen, the trustee could not reject the Agreements with respect to the bonds and Cohen was entitled to the bond portfolios. Id. at 710-11. Cohen had fully performed. He had remained an employee and was not terminated for cause. Other than paying $100, that was all he had to do to

become the owner of the bonds.

The facts in Young are similar to those in Cohen. Young and Dixon entered into an agreement under which they would both own part of the Sterling Motors stock. Young obtained his stock by exercising a stock option agreement he received in connection with his employment. The stock was not physically transferred to Young but was held in Dixon's name. The Fifth Circuit held in Young that equitable title can pass without transfer of legal title. As in Cohen, because equitable title to the stock passed to Young, the trustee could not reject the agreement, and Young was entitled to the proceeds from the sale of his stock by the Trustee. In both Young and Cohen, the trustee was not allowed to reject the parties' property rights to securities because the parties' rights had fully vested before the filing of bankruptcy.

More fundamentally, the Cohen case is a Bankruptcy Court Opinion from the Southern District of New York, not an opinion of the Second Circuit. There is no reported Appellate decision arising from the Cohen case. The Young case is an unpublished *per curium* opinion of the Fifth Circuit. Even if the cases were in conflict (they

are not) this hardly constitutes a conflict among the circuits. Under Supreme Court Rule 10(a) this Court may grant a writ of certiorari where "a United States Court of Appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter." Counsel for Respondent has not found any case in which a conflict among the circuits was predicated upon a *per curium* opinion of a Court of Appeals and a Bankruptcy Court Opinion from a different circuit. It is hard to find a conflict among the Circuits when only one Circuit has ruled. It is hard to find a conflict among the Circuits when the cases are not in conflict.

D.

There Is No Important Federal Question

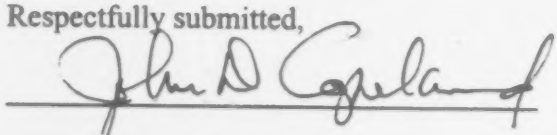
Petitioner believes that he raises an important question in the administration of Bankruptcy cases for Trustees all over the country. While there may be a fair amount of executory contract litigation in Bankruptcy cases, the courts don't seem to have excessive difficulty in dealing with executory contracts. The three lower courts that considered this case had no difficulty determining that the case did not involve an executory contract at all but simply involved a

question of whether the stock was property of the estate, and they found that it was not. Petitioner has not stated how adoption of the Functional Approach would change the result in this case, and it would not. He has not shown how it would improve the administration of justice nationwide.

Conclusion

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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